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BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER

IN THE MATTER OF NOTICE OF PROPOSED
RULEMAKING FOR THE ENVIRONMENTAL
PORTFOLIO STANDARD.

No.: RE-00000C-00-0377

**AEPCO'S EXCEPTIONS TO
THE PROPOSED OPINION**

Arizona Electric Power Cooperative, Inc. ("AEPCO") submits these exceptions to the proposed Opinion and Order ("Proposed Opinion") filed January 17, 2000. Attached hereto are AEPCO's Rules' Comments dated October 5, 2000. AEPCO, however, will focus these exceptions on three issues: (1) the Commission does not have jurisdiction to adopt the EPS Rule; (2) if nonetheless the Commission proceeds, cooperative participation should be limited appropriately given unique circumstances; and (3) the EPS Rule must be submitted for Attorney General certification.

I. THE COMMISSION DOES NOT HAVE JURISDICTION TO ADOPT THE EPS RULE.

The Commission lacks both the ratemaking and substantive jurisdiction to act on this Rule. As to the first, both the Superior Court and the Court of Appeals have concluded quite recently that the Commission must ascertain the fair value of utilities' property prior to setting rates.¹ The "rates," which actually constitute a tax, set forth in the proposed R14-2-1618.A.2

¹ Superior Court Judgment dated November 27, 2000 and U S WEST Communications, Inc. v. Arizona Corporation Comm'n, --- Ariz. ---, 8 P.3d 396 (App. August 29, 2000).

1 were announced at an Open Meeting last spring. No fair value or cost of service analysis has
2 ever taken place. In AEPCO's case, it estimates that system wide the EPS surcharge will raise
3 only \$800,000 annually while compliance costs will be more than three times that amount each
4 year over the life of the EPS. Those uncovered costs to fund renewable technologies will
5 translate into still higher rates for consumer owners on the AEPCO system--a situation which
6 Arizonans rejected by a more than 2-1 margin in the Staff sponsored survey research on this
7 subject.

8 The Commission also lacks the substantive jurisdiction to enact the EPS Rule. As
9 discussed at pages 9-10 of AEPCO's Post Hearing Memorandum:

- 10 • The Commission cannot tax to finance what it perceives to be socially
11 desirable goals (1618.A.2).
- 12 • The Commission cannot ignore constitutional and statutory restraints on
13 its penalty powers (1618.F).
- 14 • The Commission cannot appropriate monies for public purposes (1618.F 1
15 and 2).
- 16 • The Commission cannot abrogate private contracts (1618.F).
- 17 • The Commission cannot dictate a particular resource mix of power
18 (1618.B).

19 **II. IF THE COMMISSION ELECTS TO PROCEED WITH THE EPS RULE,**
20 **COOPERATIVE PARTICIPATION SHOULD BE LIMITED.**

21 Cooperatives face unique problems in attempting to comply with the EPS mandates.
22 They are non-profit, consumer owned entities with no stockholder funds and limited borrowing
resources to devote to the estimated \$1.5 million plus annual shortfall necessary to fund the EPS
Rule mandates. AEPCO's primary lending source, the Rural Utilities Service, will only finance
least cost resources and, the recent natural gas price spike notwithstanding, the record

1 demonstrates that current solar applications are not least cost. Thus, AEPCO will not be able to
2 borrow to finance EPS installations and has no shareholder capital to devote to that purpose.

3 In light of this and other factors unique to rural cooperatives, Mr. Annan, the lead
4 organizer of the Arizona Clean Energy Alliance, testified in the evidentiary hearing that EPS
5 waivers or exceptions for cooperatives were appropriate:

6 I'm sensitive to the fact that the rural consumer is sometimes the most
7 disadvantaged. We think the portfolio standard does provide unique
8 opportunities to bring electricity to the rural sector where grid electricity is
9 not competitive. But ACELA stands ready to talk to the rural sector, to
10 those who represent the rural sector to see whether or not these rules ought
11 to be postponed for them or somehow waived for this immediate time until
12 such time as it does begin to make real sense for them.²

13 If the Commission adopts the EPS Rule, AEPCO urges the following amendment to the
14 Proposed Opinion in the form of a new subsection R14-2-1618.A.5 at page 13, line 8:

- 15 5. Affected Utilities which are non-profit, member owned
16 cooperatives are exempt from the portfolio percentage
17 requirements set forth in R14-2-1618.B except as provided in this
18 subsection. Such cooperative Affected Utilities shall collect the
19 Environmental Portfolio Surcharge authorized by R14-2-1618.A.2
20 and shall apply the proceeds toward meeting the renewable
21 portfolio percentages. To the extent that the proceeds of the
22 Surcharge are insufficient to allow such cooperative Affected
Utilities to meet or exceed the renewable portfolio percentages, no
further purchase or installation of renewable resources or
technologies shall be required.

Adoption of this limited exception would still require cooperatives to participate but only to the
extent of funds made available by the Surcharge--an appropriate limitation given the
circumstances unique to cooperatives

² HR TR, p. 493, ll. 9-18.

1 **III. IF ADOPTED, THE EPS RULE MUST BE SUBMITTED FOR ATTORNEY**
2 **GENERAL CERTIFICATION.**

3 At page 6, lines 15-16 of the Proposed Opinion, the Commission states its intention to
4 bypass the Attorney General certification process required by the Administrative Procedure Act.
5 If it does so, it will violate the APA, case law and a Superior Court ruling which are directly on
6 point.

7 In U S WEST Communications, Inc. v. Arizona Corporation Comm'n., 197 Ariz. 16, 3
8 P.3d 936 (App. 1999), the Court of Appeals held that rules such as the EPS Rule are not
9 ratemaking related and must be submitted for Attorney General certification. Last summer,
10 Judge Colin Campbell specifically ruled that the predecessor to the EPS Rule had to be
11 submitted to the Attorney General for review.

12 The inclusion of surcharge "rates" in the EPS Rule does not alter this result. The Court
13 of Appeals specifically ruled in U S WEST that such "incidental relationship(s)" do not relieve
14 the Commission of its APA obligations. It also ruled that billing and collection rules--matters
15 which undeniably are more closely linked to ratemaking than these surcharge rates--have to be
16 submitted for certification. The EPS Rule must be submitted as well.

17 **CONCLUSION**

18 AEPCO urges the Commission not to adopt the EPS Rule. If, nonetheless, the
19 Commission adopts the Rule, AEPCO requests the Proposed Opinion be modified to limit
20 cooperative participation and provide for Attorney General certification as stated in these
21 exceptions
22

1 RESPECTFULLY submitted this 26th day of January, 2001

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BEFORE THE ARIZONA CORPORATION COMMISSION

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RULEMAKING FOR THE ENVIRONMENTAL
PORTFOLIO STANDARD.

No.: RE-00000C-00-0377

**AEPCO'S COMMENTS ON THE
PROPOSED RULE**

Pursuant to the Procedural Order dated August 9, 2000, the Arizona Electric Power Cooperative, Inc. ("AEPCO") submits these comments on the proposed Environmental Portfolio Standard ("EPS") Rule.

**I. FOR A NUMBER OF LEGAL AND JURISDICTIONAL REASONS, THE
COMMISSION SHOULD NOT ADOPT THE EPS.**

The Commission does not have the legal authority to adopt the EPS. These issues previously have been briefed by several of the parties to the predecessor docket (No. E.0000A-99-0205) and will not be extensively re-addressed here. For convenience, attached hereto as Exhibits A and B are AEPCO's Post-Hearing Memorandum dated November 17, 1999 and its Application for Rehearing of Decision No. 62506 dated May 24, 2000 which identify and discuss these issues in greater detail.

Recent Superior Court and Court of Appeals decisions have reinforced the wisdom and

1 accuracy of several of these arguments.¹ Both Judge Campbell and the Court of Appeals have
2 ruled that this Commission must ascertain the fair value of utilities' property prior to setting
3 rates. No such process was followed in establishing the rate contained in the Environmental
4 Portfolio Surcharge in R14-2-1618.A.2. In AEPCO's case, the surcharge will fall many hundred
5 thousand dollars short each year of meeting the costs of the EPS mandates.² Thus, adoption of
6 the EPS Rule denies AEPCO its constitutional right to recover its costs and earn a reasonable
7 rate of return on its fair value.

8 Judge Campbell also ruled in July that the prior Solar Portfolio Rule (previously R14-2-
9 1609) is not a function of this Commission's ratemaking powers.³ This ruling reinforces
10 AEPCO and other parties' arguments that the Commission lacks either the constitutional or
11 statutory authority to adopt the proposed EPS.⁴ Neither Article 15 of the Constitution nor Title
12 40 of the Arizona Revised Statutes gives this Commission the authority to adopt the Rule.

13 AEPCO would urge the Commission not to inject still more uncertainty into the electric
14 competition arena by adopting the EPS. The adoption of the proposed Rule flies in the face of
15 settled constitutional and statutory law--as reaffirmed no less than three times in the past 18
16 months by this state's trial and appellate courts. If the Commission proceeds to adopt the EPS,

17 ¹ Judge Campbell's July 12, 2000 minute entry in Tucson Electric Power v. Commission, cause
18 no. CV 97-03748 (Consolidated) and the decision of the Arizona Court of Appeals on August 29,
19 2000 in U S WEST v. Commission, 1 CA-CV 98-0672.

20 ² AEPCO estimates the Surcharge would only raise \$800,000 annually while compliance costs
21 would be \$2.5-2.7 million over the approximately 11 year life of the EPS.

22 ³ Judge Campbell's ruling is consistent with last year's Court of Appeals decision in U S WEST
v. Commission, 1999 WL 308563 (Ariz. App. Div. 1, May 18, 1999).

⁴ See, for example, pages 9-10 of AEPCO's Post-Hearing Memorandum; pages 7-9 of APS Post-
Hearing Brief; and pages 2-5 of RUCO's Application for Rehearing--all in Docket No. E-
00000A-99-0205.

1 millions of dollars of investment will be unlawfully required. Millions of dollars of rates will be
2 unlawfully collected.

3 Renewable objectives are not advanced by adoption of the EPS given the uncertainty and
4 litigation that decision will foster. If, notwithstanding the results of Staff's sponsored survey
5 research that most Arizonans do not want to pay more for renewables the Commission believes
6 these goals should be pursued, it should seek the necessary constitutional and statutory changes
7 to do so prior to implementation. Adoption of the EPS Rule now will retard not advance the
8 cause of a sustainable and reliable renewables program.

9 **II. SHOULD THE COMMISSION NONETHELESS DECIDE TO ADOPT THE EPS**
10 **RULE, SPECIAL PROVISIONS SHOULD BE INCLUDED FOR THE**
11 **COOPERATIVES TO LIMIT THEIR PARTICIPATION.**

12 As the all requirements supplier for several of the state's rural distribution cooperatives,
13 AEPCO offered evidence in the predecessor docket concerning why the EPS Rule should not be
14 applied to cooperatives:

- 15 • AEPCO needs no new resources of any kind--renewable or otherwise--in the near
16 term to meet the state's rural power needs.
- 17 • Investment in renewable resources when no resources are needed exacerbates
18 consumer rate impacts and contributes unnecessarily to potential stranded costs.
- 19 • Cooperatives have little or no demand side management or other similar program
20 funds to shift to renewable expenditures unlike investor owned utilities.
- 21 • Non-profit cooperatives have no shareholder source of funds to apply to the
22 capital costs associated with the EPS mandate.
- Non-profit cooperatives, therefore, may look only to borrowed funds to finance
the EPS mandate. Given RUS' requirements that capital be expended only on
needed, least-cost resources, the EPS rule meets neither standard leaving
cooperatives with no funding source other than the surcharge to meet the EPS
requirements.

- Any ancillary, general economic benefits the EPS Rule may generate will most likely benefit the state's urban not rural areas.

Without waiver of the issues raised in Section I of these comments, in light of these and other factors AEPCO suggests that the EPS Rule be modified to limit the level of cooperative participation to the amount of monies raised by the Environmental Portfolio Surcharge.

To accomplish this, a new subsection A.1 should be added to R14-2-1618 as follows:

1. Affected Utilities which are non-profit, member owned cooperatives are exempt from the portfolio percentage requirements set forth in R14-2-1618.B.1 except as provided in this subsection. Such cooperative Affected Utilities shall collect the Environmental Portfolio Surcharge authorized by R14-2-1618.A.3 and shall apply the proceeds toward meeting the renewable portfolio percentages. To the extent that the proceeds of the Surcharge are insufficient to allow such cooperative Affected Utilities to meet or exceed the renewable portfolio percentages, no further purchase or installation of renewable resources or technologies shall be required.

The remaining subsections of R14-2-1618.A should be renumbered accordingly.

Adoption of this limited exemption would require cooperatives to participate to the extent of funds made available by the Surcharge. It would, however, limit that participation appropriately for the cooperatives in light of the factors outlined above.

III. SEVERAL PROVISIONS OF THE RULE SHOULD BE CLARIFIED OR MODIFIED.

R14-2-1618.A initially references "Electric Service Providers" as being subject to the Rule but promptly exempts them from participation until 2004. A broader term or additional terms probably need to be used rather than Electric Service Provider in the first sentence of 1618.A and perhaps throughout the Rule. Similarly, the word "Competitive" before ESPs should be stricken in 1618.A.1.

The reference in 1618.A.1 to a "pro rata share of funds collected for portfolio purposes" is vague. Assuming the "share of funds" relates to the Surcharge in 1618.A.2, a reference to that

1 section would clarify what monies are involved. Also, would the pro rata sharing requirement be
2 customer class specific, total system KWH driven or based on some other formula?

3 1618.B.3. b and c read exactly the same for years 2002 and 2003. If that is intended, (c)
4 could be deleted and the year "2003" added to (b). 1618.C is surplusage from a prior Rule
5 version and should be deleted.

6 In 1618.D.1, it is unclear whether all early extra credit multipliers end in 2003 or
7 continue beyond that year for five years after installation. AEPCO believes the Rule's intent is
8 the latter and therefore suggests deleting the sentence "The Early Installation Extra Credit
Multiplier would end in 2003."

9 **CONCLUSION**

10 AEPCO urges the Commission to reject the EPS Rule or, alternatively and without
11 waiver, modify and clarify it as suggested in Sections II and II of these Comments.

12 RESPECTFULLY submitted this 5th day of October, 2000

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